conclusion that the Amendment was drawn for the purpose of doing away for the future with the principle upon which the Pollock case was decided, that is, of determining whether a tax on income was direct, not by a consideration of the burden, placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the Amendment provides that income taxes, from whatever source the income was derived, shall not be subject to the regulation of apportionment."

M. A. S.

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DAMAGES FOR THE LOSS OF THE USE OF PROPERTY.—In these days of numerous automibiles used solely for pleasure purposes, it is interesting to note what damages can be recovered when a machine is injured by the negligent acts of a tort-feasor. In a recent decision in New York, the trend of modern authority is very well set forth. This case, *Dettmar* v. *Burns Bros.*, 181 N. Y. Supp. 146, holds, (1) that damages for the loss of the use of an automobile may be allowed against one who negligently injures it, although the owner intended to use it only for pleasure and not for rent or profit, and (2) that evidence of the rental value of an automobile is admissible upon the question of compensation to be awarded the owner for being deprived of its use through another's negligence, although he did not intend to rent it for profit.

It will now be of interest to follow, for a short space at least, the development of this branch of the law of damages as it has led up to the present view. A good starting-point is the rule that a recovery may generally be had for the loss of the use of specific property, where the reasonable worth of such use may be shown with fair certainty.[1] In another form it is stated that the damage in an action for injury to property not caused by malice is compensation commensurate with the loss, and this includes the expense of restoration of the property to soundness, compensation for the loss of its use during the period of disability, and the difference between its value before the injury and after the cure or repair.[2] This rule is subject to two conditions: the damages must be such as might naturally be expected to follow from the injury; and they must be certain, both in their nature and in respect to the cause from which they proceed.[3] The conclusion to be drawn from these premises is ably set forth in the case of *Griffin* v. *Colver*[4] by Selden, J.:

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[1] Hunt *v.* Oregon Pacific R. Co., 36 Fed. 481, 1 L. R. A. 842; Wright *v.* Mulvaney, 78 Wis. 89, 46 N. W. 1045, 9 L. R. A. 807.
[2] Schalscha *v.* Third Ave. R. Co., 43 N. Y. Supp. 251.
[3] Griffin *v.* Colver, 16 N. Y. 489, 69 Am. Dec. 718 and note.
[4] *Supra.*

> "The rent of a mill or other similar property, the price which should be paid for the charter of a steamboat, or the use of machinery, etc., are not only susceptible of more exact and definite proof, but in a majority of cases would, I think, be found to be a more accurate measure of the damages actually sustained in the class of cases referred to, considering the contingencies and hazards attending the prosecution of most kinds of business, than any estimate of anticipated profits, just as the ordinary rate of interest is, upon the whole, a more accurate measure of the damages sustained in consequence of the non-payment of a debt than any speculative profit which the creditor might expect to realize from the use of the money."

This view has been supported by numerous other decisions.[5]

The next step in the development is the conclusion that, where property is injured and the use of it is lost, the value of the use ought not to be the mere value of the use intended by the owner, but the value of the possible use.[6] The wrong-doer has no right to consider what use was in fact to be made by the owner. This rule was established by two recent cases in England. In *The "Greta Holme"*,[7] a steam dredger was injured in a collision due to the negligence of another ship and the owners were deprived of the use of the dredger for some weeks and the dredging works were delayed. They did not hire another dredger to take its place while under repairs. The House of Lords held that, though the owners were not out of pocket in any definite sum, they were entitled to recover damages for the loss of the use of the dredger. And in *The "Mediana"*,[8] a lightship, belonging to a harbor board and used for lighting approaches, was damaged in a collision caused by the negligence of the defendants. The place of the damaged lightship was taken by another *belonging to the board and maintained at an annual expense for the purpose of such an emergency*. The House of Lords held that the board was entitled to recover, not only out of pocket expenses caused by the collision, but also substantial damages for the loss of the services of the damaged lightship during the time her place was taken by the substituted lightship.

The New York courts readily permitted the recovery of damages for expense incurred by the plaintiff in hiring property to replace that which was injured while the latter was undergoing repairs,[9] but when it came to a case where an automobile was used for pleasure only, and was not replaced by a hired car dur-

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[5] Butler *v.* Mehrling, 15 Ill. 488; Buchanan's Sons *v.* Cranford Co., 98 N. Y. Supp. 378.

[6] 1 SEDGWICK, DAMAGES, 9th ed., p. 195.

[7] (1897) L. R. A. C. 596.

[8] (1900) L. R. A. C. 113.

[9] Wellman *v.* Miner, 44 N. Y. Supp. 417; Cardozo *v.* Bloomingdale, 140 N. Y. Supp. 377.

ing the period of repairs, there was a distinct balk. In the case of *Foley* v. *Forty-Second St., etc., R. Co.*[10] the court held that such damages were highly speculative and could not be recovered. This case has a short opinion with no citations of authority, but in spite of this, two more cases were decided in the same way, depending on this case alone for authority.[11]

These cases, however, have since been overruled by a number of cases in New York.[12] In one of these,[13] Mullan, J., states:

> "We think the correct rule would be to allow the rental value of the car, irrespective of whether another car had actually been hired to take the temporary place of the car damaged and undergoing repairs. When a seller fails to deliver goods purchased of him, the measure of damages, where the market rule applies, is based on the market itself, and not on whether the buyer goes into the market and buys; indeed, proof of the latter must be excluded, if objected to. We can see no reason why the rule in cases such as this should not accord in that respect with the rule in the sales of goods cases."

The same conclusion has been reached in Connecticut on the ground that the owner who expects to use his car for pleasure alone has the same legal right to its continued use and possession as an owner who expects to rent his car for profit.[14] The doctrine in New York has even been carried to the extent of allowing recovery for the value of the use of a golf-club while it was undergoing repairs.[15]

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[10] 101 N. Y. Supp. 780.

[11] Bondy *v.* New York City R. Co., 107 N. Y. Supp. 31; Donnelly *v.* Poliakoff, 139 N. Y. Supp. 999.

[12] Naughton Mulgrew Motor Car Co. *v.* Westchester Fish Co., 173 N. Y. Supp. 437; Dettmar *v.* Burns Bros., *supra.*

[13] Naughton Mulgrew Motor Car Co. *v.* Westchester Fish Co., *supra.*

[14] Cook *v.* Packard Co., 88 Conn 590, 92 Atl. 413, L. R. A. 1915C 319 and note; Banta *v.* Stamford Motor Co., 89 Conn. 51, 92 Atl. 665.

[15] Jessup *v.* Platt, 135 N. Y. Supp. 635.